

Kopja Informali ta' Sentenza



**QORTI CIVILI  
PRIM' AWLA**

**ONOR. IMHALLEF  
MARK CHETCUTI**

Seduta tat-30 ta' April, 2013

Citazzjoni Numru. 1957/1997/1

**Carmen sive Charmaine Ebejer**

**vs**

**Dr. Ivan Vella u Dr. Josie Muscat in rapprezentanza  
tas-Summit Eye Laser Clinic u St. James Health  
Centre**

**Il-Qorti,**

Rat ic-citazzjoni tal-attrici tad-9 ta' Settembru 1997 fejn qalet hekk:

Peress illi l-attrici giet ammessa fis-Summit Eye Laser Clinic gewwa s-St. James Health Centre, fejn il-konvenut Tabib Ivan Vella kellu jaghmilha 'Excimer Laser Treatment' ta' ghajnja l-leminija. Fil-fatt hija giet mitluba thallas is-somma ta' Lm350, fi kliemhom, 'ghax se jaghmillek kollox f'daqqa';

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Peress illi b'rizultat tat-trattament li nghata lill-attrici, kien hemm deterjorament rapidu tal-vista ta' ghajnja l-leminja;

Peress illi, ghalkemm il-konvenuta rrikorriet ghand il-konvenut Dr. Ivan Vella u nformatu dwar dan, huwa baqa' jinsisti li kollox kien qiegħed sewwa u li biz-zmien kienet ser tigi tajba;

Peress illi b'negligenza grossolana, l-konvenut halla z-zmien ighaddi, u sussegwentement l-attrici giet mibghuta l-Ingilterra mill-Awtoritajiet tas-Sahha Maltin fejn kellha tissottometti ruhha għal interventi kirurgici biex l-ispeċjalisti barranin jippruvaw jirrimedjaw xi ffit mill-hsara li saritilha f'eta daqshekk zghazugħa;

Peress illi l-attrici sofriet dizabilita' permanenti fil-vista ta' ghajnja l-leminja;

Jghidu l-konvenuti, jew min minnhom, ghaliex din il-Qorti m'ghandhiex:

1. Tiddikjara illi l-attrici sofriet dizabilita' permanenti fil-vista ta' ghajnja x-xellugija b'rizultat tat-trattament li nghatat mill-konvenut Dr. Ivan Vella;

2. Tiddikjara lill-konvenuti, jew min minnhom, responsabbli għad-danni kollha konsegwenzjali sofferti mill-attrici;

3. Tillikwida d-danni sofferti mill-attrici;

4. Tikkundanna lill-konvenuti jhallsu d-danni hekk likwidati;

Bl-ispejjes, inkluz dawk ta' l-ittra ufficjali tas-7 ta' Awwissu 1996, kontra l-konvenuti li huma ngunti għas-subizzjoni;

Bl-imghax skond il-ligi.

Rat in-Nota tal-eccezzjonijiet tal-konvenut Dr. Josie Muscat in rappresentanza tas-St. James Health Centre li jghid hekk:

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1. Preliminarjament illi l-azzjoni attrici hija preskritta ai termini tal-artikolu 2153 tal-Kodici Civili;

2. Illi s-St. James Health Centre mhijiex persuna guridika u ghalhekk ic-citazzjoni ma tistax triegi fil-konfront tal-konvenut "Dr. Josie Muscat in rapprezentanza tas-St. James Health Centre";

3. Illi f'kull kaz u bla pregudizzju ghas-sueccepit, l-eccepjent nomine mhuwiex legittimu kontradittur f'din il-kawza u konsegwentement ghandu jigi liberat mill-osservanza tal-gudizzju billi s-Summit Eye Laser Clinic titmexxa mill-kumpanija Summit Eye Laser Clinic Limited li hija ghal kollox awtonoma mill-kumpanija li tmexxi s-St. James Health Centre;

4. Illi bla pregudizzju ghas-sueccepit it-talbiet attrici huma nfondati fil-fatt u fid-dritt billi l-eccepjent nomine ma kien responsabbli ta' ebda negligenza fil-konfront tal-attrici;

5. Salvi eccezzjonijiet ulterjuri.

Rat in-Nota tal-eccezzjonijiet tal-konvenuti Dr. Ivan Vella u Dr. Josie Muscat in rapprezentanza tas-Summit Eye Laser Clinic li jghidu hekk:

1. Preliminarjament illi l-azzjoni attrici hija preskritta ai termini tal-artikolu 2153 tal-Kodici Civili;

2. Illi s-Summit Eye Laser Clinic mhijiex persuna guridika u ghalhekk ic-citazzjoni ma tistax triegi fil-konfront tal-konvenut "Dr. Josie Muscat in rapprezentanza tas-Summit Eye Laser Clinic";

3. Illi f'kull kaz u bla pregudizzju ghas-sueccepit it-talbiet attrici huma infondati fil-fatt u fid-dritt billi l-intervent u l-kura fuq l-attrici saru skond id-dettami tax-xjenza u tal-professjoni medika u l-eccepjenti bl-ebda mod ma kienu negligenti jew b'xi mod naqsu fil-konfront tal-istess attrici;

4. Salvi eccezzjonijiet ulterjuri.

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Rat ix-xhieda, id-dokumenti, l-atti kollha prezentati inkluz in-noti ta' sottomissjonijiet tal-partijiet.

### **Ikkunsidrat**

Illi dina l-kawza tirrigwarda talba ghal danni maghmula mill-attrici fejn hija qed tallega negligenza professjonali fl'intervent fuq ghajnejha l-leminija bl'excimer laser treatment li sar f'St James Health Centre, Zabbar fil-17 ta' Lulju 1995. Hi tallega li wara l-intervent kien hemm deterjorament rapidu fil-vista taghha tant li kellha tintbghat mill-Awtoritajiet tas-Sahha ta' Malta, l-Ingilterra biex l-ispejalisti barranin jippruvaw jirremedjaw.

### **Legittimu kontradittur**

Gie eccepiet illi Summit Eye Laser Clinic ma hix persuna guridika peress illi dan il-clinic li hu awtonomu minn St. James Health Centre jitmexxa minn kumpanija Summit Eye Laser Clinic Limited.

In kwantu ghal St. James Heath Centre, din hi proprjeta ta' St. James Health Centre Limited.

Jean Claude Muscat ikkonferma li l-kumpanija Summit Eye Laser Clinic Limited twaqqfet f'Lulju 1994 u d-diretturi taghha kienu Dr. Vella u Dr. Muscat. Din il-kumpanija giet akkwistata fl-2001 minn St. James Hospital Limited u l-isem inbidel ghal St. James Eye Clinic Limited (ara affidavit tieghu a fol. 89 tal-process Vol. 1).

Summit Eye Laser Clinic kien biss isem bla ebda personalita guridika u s-socjeta Summit Eye Laser Clinic Limited kienet il-kumpanija li tmexxi l-istess klinika. L-attrici ma gabet ebda prova li torbot dan l-isem bla personalita ma' Dr. Josie Muscat u fl-ebda stadju l-attrici ma talbet il-kjamat in kawza tas-socjeta Summit Eye Laser Clinic Limited.

Ghalhekk in kwantu ghal Summit Eye Laser Clinic jidher li Dr. Josie Muscat hu iccitat hazin u ghandu jigi liberat mill-osservanza tal-gudizzju.

In kwantu ghal St. James Health Centre Jean Claude Muscat ighid li din kienet titmexxa mill-kumpanija St. James Health Centre Limited u iktar tard l-isem inbidel ghal St. James Hospital Holdings Limited. St. James f'Haz-Zabbar f'dak iz-zmien ma kellu x'jaqsam xejn mal-kumpanija Summit Eye Laser Clinic Limited u l-unika konnessjoni kienet li l-imsemmija socjeta kienet tuza kamra minn St. James. Jean Claude Muscat izid illi l-makkinarju fil-fatt inxtara minn Summit Eye Laser Clinic Limited u kien proprjeta taghha.

Jirrizulta ghalhekk li ma hemm ebda konnessjoni bejn St. James Health Centre u l-attrici fejn jirrigwarda responsabilita' o meno ghal dak li allegatament sehh lilha billi l-konnessjoni kienet biss bejnha, il-kirurgu u semmai l-kumpanija li kienet tmexxi s-Summit Eye Laser Clinic cioe Summit Eye Laser Clinic Limited. Il-fatt li ghall-intervent marret St. James Health Centre mnejn kienet topera Summit Eye Laser Clinic Limited ma jbidel xejn sakemm ma jigix pruvat konnessjoni legali jew ekonomika bejn Summit Eye Laser Clinic Limited u St. James Health Centre fl-operat tal-istess Summit Eye Laser Clinic Limited liema prova ma saritx u kien jinkombi fuq l-attrici li tippruvaha. Ghalhekk anki din l-eccezzjoni qed tigi milqugha u St. James Health Centre kif citata bhala rapprezentata minn Dr. Joseph Muscat ma ghandha ebda rabta legali mal-attrici stante li l-ilmenti mressqa minnha ma humiex diretti ghal xi nuqqas ta' St. James Health Centre izda lejn l-operat tal-kirurgu u min kien imexxi l-Eye Clinic li kif jirrizulta l-ebda wahda minnhom ma kienet taqa' b'xi mod fir-responsabilita jew b'xi partecipazzjoni allura ta' St. James Health Centre.

Ghalhekk din l-eccezzjoni qed tigi milqugha.

### **Eccezzjoni tal-preskrizzjoni ai termini tal-artikolu 2153**

Din l-eccezzjoni tqajmet mill-konvenuti kollha. Billi l-konvenuti Summit Eye Laser Clinic u St. James Health Centre mhux legittimi kontraditturi, ma hemmx lok li din l-eccezzjoni tigi ezaminata fil-konfront taghhom.

Mhux l-istess jinghad pero ghal konvenut Dr. Ivan Vella li hu legittimu kontraddittur f'din l-azzjoni qua kirurgu responsabbli ghall-intervent. L-artikolu 2153 ighid illi l-azzjoni ghad-danni mhux kagonata b'reat hi preskritta bl-gheluq ta' sentejn. L-intervent sehh fis-17 ta' Lulju 1995 u l-kawza giet prezentata fid-9 ta' Settembru 1997. Ghalkemm jinghad li giet prezentata ittra ufficjali fis- 7 ta' Awissu 1996 ma gietx esebita kopja taghha.

Il-Qorti tqis illi r-rapport bejn l-attrici u t-tabib Ivan Vella kien wiehed bejn pazjent privat u t-tabib kirurgu taghha li bejniethom hemm rabta kontrattwali bejn professjonist u klijent u bejniethom ghalhekk ma tapplikax il-preskrizzjoni ta' sentejn izda semmai dik kontrattwali ta' hames snin (ara f'dan is-sens **Busuttil vs Dr. J. Muscat**, deciza mill-Prim'Awla fit-30 ta' Novembru 2010 paragrafu 29 tas-sentenza).

F'dan is-sens jinghad ukoll:

'ir-relazzjoni bejn tabib u pazjent tixbah aktar in-natura ta' kuntratt, b'dan, pero, li mit-tabib mhux mistenni dejjem rizultat possittiv, ghax l-obbligazzjoni tieghu mhux dik di risultato izda di mezzi, fis-sens li l-obbligu tat-tabib huwa deskritt bhala li 'egli e' tenuto ad usare la diligenza che la natura dell'attivita esercitata esige' (**Corte Cassazione d'Italia**, 21 ta' Lulju, 1989; kaz nmru 3476). Dan ifisser li filwaqt li t-tabib ikun irid jipprova li hu agixxa kif if-professjoni tistenna minnu, il-pazjent irid juri, fl-ewwel lok, li gara xi haga hazina waqt l-intervent kirurgiku, xi haga, jigifieri, mhux mistennija li ssehh f'operazzjoni ta' dik ix-xorta' (**Tessie Ellul et vs Dr. Astrid Camilleri**, App. Civ. 28/05/2010).

'Ghalkemm, kif inghad, il-posizzjoni hawn Malta giet ezaminata fil-kuntest tar-regoli ta' kwazi delitt, din il-Qorti hija tal-fehma li jkun aktar logiku li r-relazzjoni bejn pazjent u tabib tigi ezaminata fil-kuntest ta' kuntratt. Hu veru li kuntratt jehtieg il-kunsens ta' zewg partijiet, izda hu veru ukoll li dan il-kunsens jista jkun tacitu, u anki implicitu, basta tkun tezisti l-volonta fil-partijiet li jassumu l-obbligazzjonijiet fil-konfront ta' xulxin. Meta pazjent jersaq

lejn tabib anke jekk dan it-tabib ikun imhallas mill-Gvern biex ikun ghas-servizz tal-poplu, dak il-pazjent ikun qed ipoggi l-bzonnijiet tieghu f'idejn dak it-tabib u meta t-tabib jaccetta li jaghti s-servizz tieghu, ikun qed jintrabat fil-konfront ta' dak il-pazjent - li jaqdi d-doveri tieghu skond l-ahjar hila tieghu. Jista jinghad li tabib impjegat mal-Gvern majistax jirrifjuta li jaqdi pazjent, pero jekk hu hekk, l-ghazla jkun ghamilha meta mpjega ruhu mal-Gvern, u inoltre, tabib, allavolja impjegat, jibqa professjonist u jekk ikun rinfaccjat b'kaz li mhux tal-hila tieghu, ghandu obbligu jghaddi l-kaz lit-tabib aktar kompetenti minnu f'dik il-materja, u dan l-istess bhal kull tabib privat. Meta tabib, avolja impjegat, jaccetta li jikkura pazjent, jidhol f'relazzjoni diretta mieghu, relazzjoni kuntrattwali li tista twassal ghall-hlas tad-danni f'kaz ta' inadempjenza' (**Rose Gauci et vs Mr Donald Felice et**, App. Civ. 31/10/2008).

'L-obbligazzjonijiet kuntrattwali, fis-sistema civili Malti, jistghu jkunu di dare, di fare Jew di non fare, u f'kaz ta' tabib ir-responsabbilta tieghu titqies bhala wahda di fare, fejn it-tabib qed jigi mqabbad biex jaghti s-servizz tieghu bi skop li jottjeni ghan definit. Dan ma jfissirx, pero, li mit-tabib hu mistenni rizultat, u jekk ma jottjenix rizultat, allura jkun responsabbli ghad-danni' (**ibid**).

Ghalhekk din l-eccezzjoni qed tigi michuda.

### **Indoli legali**

Jinghad illi f'materja ta' valur ta' prova dwar ir-rapport tekniku l-insenjament gurisprudenzjali huwa fis-sens li, ghalkemm ir-rapport tekniku huwa kontrollabbli mill-gudikant bhal kull prova ohra u l-Qorti mhix tenuta li taccetta l-konkluzzjonijiet peritali kontra l-konvinzjoni taghha, il giudizio dell'arte kif espress mill-Perit Tekniku m'ghandux jigi skartat sakemm ma jkunx jidher sodisfacentement illi l-konkluzzjonijiet peritali huma, fil-komplex kollu tac-cirkostanzi rragjonevoli. Il-Qorti m'ghandhiex tiskarta i l-konkluzzjonijiet tal-espert, specjalment fuq materja purament teknika, b'mod legger jew kappriccjuz. Il-konvinzjoni kuntrarja taghha ghandha tkun 'infurmata u bbazata fuq ragunijiet li gravament

ipoggu fid-dubbju dik l-opinjoni teknika' (**Giswarda Bugeja vs Emmanuele Muscat**, App. Civ. Vol. LI/1/390; u **Philip Grima vs Carmelo Mamo**, App. Civ. 29 ta' Mejju, 1998). Issir referenza ukoll ghal kawza **Dingli Estates & Co vs Mangion**, deciza mill-Qorti Civili Prim' Awla fit-30 ta' Mejju, 2002 fejn inghad illi 'f'materja ta' perizja teknika japplika l-principju li sakemm ma jigux indikati oggezzjonijiet gravi u serji ta' piz li jinducuha li tisostitwixxi l-gudizzju taghha ghal dak tekniku, dan ma taghmlux'. Finalment fuq dan l-aspett il-Qorti tal-Appell fil-kawza fl-ismijiet **Benjamin Camilleri noe vs Charles Debattista et noe**, deciza fid-9 ta' Frar, 2001 qalet illi 'f'cirkostanzi bhal dawn ikun pruzuntuz ghall-gudikant illi jiddipartixxi bla raguni verament valida mir-relazzjoni teknika. Dan mhux biss ghax ma kellux il-mezzi ghad-disposizzjoni tieghu biex serenament jinoltra ruhhu fl-aspetti teknici tal-meritu, imma ukoll ghaliex necessarjament tkun tonqsu dik il-konoxxenza mehtiega biex, b'mod kritiku, jasal ghal konvinciment divers minn dak li jkunu waslu ghalih l-esperti nominati minnu'.

Issa, f'dan il-kaz il-perizja medika maghmula mill-espert mahtur minn dina l-Qorti, Dr. Jan Janula tikkonkludi billi tghid li l-konvenut Dr.I.Vella ma huwiex responsabbli ghall-akkadut msemmi fic-citazzjoni.

Ikun utili li f'dan l-istadju li l-Qorti tissottolineja l-gurisprudenza lokali fir-rigward tas-suggett tar-responsabbilita medika. Il-Kodici Civili ma jipprovdi ebda norma specjali fir-rigward tal-professjoni medika u ghalhekk japplikaw in-normi generali tad-dritt civili fil-materja ta' responsabilita (ara artikolu 1031 sa 1033 tal-Kap. 16). Inoltre minn qari ta' giurisprudenza fuq il-materja, wiehed jista' jislet is-segweni kostatazzjonijiet:

'Il danno e' sempre sventuratamente troppo certo in coteste deplorevoli controversie; quanto all colpa, il tribunale dovra apprezzarla' (**Laurent** - Principii di Diritto Civile Vol. XX. para. 516 pg. 422).

'Non e' possibile determinare in modo generale il limite della responsabilita dei medici. Spetta al magistrato



ravvisarla in ciascuna specie, secondo i fatti e le circostanze, che possono infinitamente variare, non perdendo mai di vista quell principio fondamentale che deve sempre servirgli di guida, val dire che per aversi responsabilita professionale fa d'uopo che taluno abbia commesso una colpa, non usando la volute vigilanza sopra se medesimo o sui propri atti, o dando prova di una ignoranza imperdonabile nell'esercizio della sua professione; spetta ai tribunali applicare questa massima con discernimento, lasciando all scienza tutta la latitudine che si deve, ma accordando del pari alia giustizia e al diritto tutto quanto loro appartiene' (**Ibid**).

'Il-Qorti taqbel mal-periti li zball fl-interpretazzjoni la 'fatti klinici ma ghandux jirrendi t-tabib Jew kirurgu responsabbli ghall-konsegwenzi taghhom. Zbalji jistghu jittiehdu, u fil-fatt jittiehdu; u kien ikun gwaj sewwa kieku l-professionista kellu jirrispondi ghal kull zball li jiehu l-ghaliex ma jirnexxilux jiggudika rettament; imma - u dana del resto ammettewh l-istess periti - ghandha issir distinzjoni bejn meta l-izball jittiehed ghal ragunijiet indipendenti mill-volonta u mill-agir ta ' min jiehu u meta l-izball jittiehed minhabba xi mankanza f'min jiehu dak l-izball. F'dan l-ahhar kaz, min jiehu l-izball ikun in kolpa minhabba dik il-mankanza tieghu, li minghajrha x 'aktarx l-izball ma kienx jittiehed; u allura huwa jirrispondi ghall-konsegwenzi la' dak l-izball li jkun ittiehed minhabba dik il-htija tieghu. Jekk, per ezempju, tabib Jew kirurgu jaqa f'errur la' gudizzju u jizbalja wara li jkun ezamina sewwa l-kaz ta' quddiemu u jkun ghamel il-possibbli kollu biex jistudjah u jaghrfu, allura certament l-ebda responsabbilita professjonali ma jista jkollu ghall-konsegwenzi; imma, ghall-kuntrarju, jekk l-izball jiehu ghalix ma jkunx ezamina l-kaz kif imissu, u l-ezami jsir b 'negligenza, allura huwa responsabbli ghall-konsegwenzi tal-izball tieghu' (**Victor Savona pro et noe vs Dr. Peter Asphar et**, PA 31/10/1949).

'ghandu jigi ritenut illi t-tabib mhux tenut ghad-danni rizultanti minn zball professjonali ammenoche dan l-izball majkunx grossolan, u ammenoche l-hsara ma tkunx tistax

tigi lilu addebitata minhabba nuqqas ta' prudenza, diligenza u attenzjoni ta' bonus paterfamilias' (**ibid**).

'Dwar il-grad ta' diligenza li professjonist bhat-tabib ghandu juza, il-gurisprudenza estera hija konkordi li mhux mistenni mit-tabib grad gholi ta' diligenza, izda dik normali li wiehed jistenna minn professjonist tal-affari tieghu. Dak li hu mistenni minn tabib hu li jzomm ruhu aggornat bl-avvanza fil-medicina, u fil-kaz konkret li jkollu quddiemu, jezercita d-diligenza li professjonist ordinarju bhat-tabib in kwistjoni kien jezercita. It-test hu necessarjament oggettiv, fis-sens li wiehed ghandu jara kif kien jezercita l-mezzi tieghu professjonist normali, bid-degree of skill li support ghandu t-tabib partikolari; pero, darba determinat dan il-livell, it-tabib ikun mistenni li jaqdi dmiru skond l-'accepted standard practice'. Il-fatt li t-tabib inzerta, f'dik l-okkazzjoni, li kellu hafna xoghol, u kien ghajjen, bl-ebda mod ma tnaqqas mid-drittijiet ta' pazjent' (**Rose Gauci et vs Mr Donald Felice et**, App. 31/10/2008).

'A charge of professional negligence against a medical man was serious. It stood on a different footing to a charge of negligence against the driver of a motor car. The consequences were far more serious. It affected his professional status and reputation. The burden of proof was correspondingly greater. As the charge was so grave, so should the proof be clear' (**Tessie Ellul et vs Dr. Astrid Camilleri**, App. 28/05/2010).

'Dwar l-oneru tal-prova, ir-regola hi li 'incombe al cliente, il quale assuma di aver subito un danno, l'onere di provare la difettosa o inadeguate prestazione professionale e il nesso casuale tra questa e il danno' Corte di Cassazione tal-Italja 21 ta' Dicembru, 1978. Hekk ukoll **Margaret Brazier** (Medicine, Patients and the Law, Penguin Books, 1987 Edit. Pg. 80) tinnota li 'proving negligence by the doctors does not conclude the case in the patient's favour. He must also show that his injury, his worsened or improved condition, was caused by the doctor's negligence' (**Rose Gauci et vs Mr Donald Felice et**, App. 31/10/2008).

## **Fatti u mertu**

Fil-kaz in ezami l-allegazzjonijiet principali kontra Dr. Vella huma li ma nfirmawx sew lill-attrici bir-riskju qabel sehh l-intervent, li uza makna mhux approvata, li l-attrici iffirmit consent form f'hin meta ma kinitx f'pozizzjoni tifhem u tara sew dak li kienet qed tiffirma u li r-retinal detachment li kellha f'ghajnja il-leminja grat minhabba l-intervent bil-laser li ghamlet il-konvenut Dr.Vella u ghalhekk hemm ness dirett bejn id-dannu soffert u l-operat tal-kirurgu.

Ilment li l-makna uzata ma kienitx approvata

L-attrici tilmenta li l-makna uzata ghal Excimer Laser fuq ghajnejha ma kinitx approvata mill-FDA Amerikan.

Il-konvenut Dr. Ivan Vella jsostni li l-laser equipment li uza kellu CEE certification u approvazzjoni tal-Unjoni Ewropeja u eventwalment anke tal-FDA. Hu jghid li pero huwa qatt ma kellu ilmenti mill-Awtorita' tas-Sahha dwar il-makna.

L-espert nominat mill-Qorti Dr. Janula f'dan ir-rigward qal li: 'The approval of the FDA is necessary in the US not in Europe. What is important for the Maltese authorities is that it is approved in Europe. At that time it should have been the Maltese authorities who had to approve it because we were not members in the EU (ara fol. 573).

Dan l-ilment tal-attrici ma hux utili ghal pretensjoni taghha. Fl-ewwel lok l-attrici naqset li tghid ghalfejn socjeta Maltija li qed tuza l-apparat f'Malta ghandha tistenna l-approvazzjoni tal-FDA Amerikan biex tuza tali makkinarju. Fit-tieni lok lanqas ma gie ppruvat illi dan il-makkinarju kellu xi difett jew ma kienx tajjeb ghall-uzu jew li l-awtoritajiet Maltin m'approvawx.

Il-provi juri illi din il-makna kienet idonea ghall-intervent simili fiz-zmien li sar l-intervent u mhux kontestat li Dr. Vella kien l-uniku oftalmologu bl-esperjenza u kapacita li juza l-makna dak iz-zmien. Ma ngiebet ebda prova li turi li

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din il-makna ma kienitx sikura għall-iskopijiet li għalihom setgħet tintuza cioè għal correction ta' short sightedness.

Dan l-ilment għalhekk ma jistax jintlaqa'.

### **Nuqqas ta' informazzjoni dwar l-intervent**

Din il-kwistjoni tiftah kapitolu iehor fir-responsabilta u doveri ta' kura tal-professjonist lejn il-pazjent tiegħu. Fuq dan il-punt hemm divergenza bejn il-partijiet. Filwaqt li l-attrici tinsisti li ma kinitx inghatat informazzjoni biex tiehu dak imsejjah bhala 'informed consent', Dr. Vella jishaq illi hu kien car hafna magħha dwar l-aspetti kollha tal-intervent.

L-attrici ssostni li l-konvenut Dr. Vella ma kien taha ebda letteratura biex jispjegalha l-intervent li kien ser jagħmel bil-laser. Ghalkemm kien semmilha li kien ser jagħmillha kors fil-fatt ma sar xejn minn dana qabel l-operazzjoni. Dwar dana l-konvenut ighid li 'He cannot remember if she attended a course or information session for prospective candidates (ara fol. 272).

Dwar l-informazzjoni li tingħata minnu, l-konvenut qal li: I explain to everybody the risks which are attached directly to Excimer Laser. You mention the risks that are attached to the procedure. In this case retinal detachment is not connected to Excimer Laser so you do not mention that risk.

Ikompli: I mentioned that there is a possibility that the best possible vision that she is expecting would not be attained, and that there can be haziness, called Haze of the Cornea following the treatment; that the vision can take some time to clear, sometimes weeks, sometimes months, related to the direct result of the laser and other minor complications, risk or minor complications, dry eyes, watery eyes, increased insensitivity to light, halos around light and all the rest. This is explained to everybody (ara fol. 271). I mentioned all the possible risks or complications attached directly to Excimer Laser PRK, nothing more, nothing less.

Ighid ukoll: I told her that, because of her substantial degree of astigmatism, there was the possibility that she would not attain the best possible unaided vision, and that she might still require to wear glasses or contact lenses after the laser. I also told her that there was the possibility that she might require a second laser intervention so as to improve the result of the first laser treatment. I, however, added that even if she did not attain the result, the chances would be that she would have a substantial reduction in her short-sightedness (ara fol. 309).

Il-konvenut izid ighid hekk: We also went through the possible side-effects and after-effects which are related with excimer laser Photo Refractive Keratectomy. Miss Ebejer clearly understood and agreed with what I had explained to her and said that she was ready to undergo excimer laser correction to the right eye.

Min-naha taghha l-attrici tghid li l-konvenut qalilha li tigi tajba izda ma tiftakarx izjed x'qalilha, qallhiex xi haga ohra (ara fol. 108).

Qabel ma l-konvenut iddecieda jekk l-attrici setghetx toqghod ghall-intervent huwa ghmel a pre-laser ophthalmic examination. Dwar dan huwa jghid hekk; Before Carmen Ebejer was treated with Excimer Laser I did a complete ophthalmic examination on her. I examined the retina, I examined the macula, I examined the peripheral retina, and in my judgment she was a good candidate for laser (ara fol. 276). L-informazzjoni dwar l-ezami li huwa ghmel lill-attrici tinsab dettaljatament spjegata a fol. 308. Sab li: Retina flat, no tears, no holes, scattered benign peripheral retinal degeneration.

Ghal konvenut: She (l-attrici) ended up as she is because she developed a retinal detachment, but the retinal detachment is not connected to the Excimer Laser Treatment, and everybody admits and everybody knows that, and I mean that you are the only one in the world who is saying the opposite (ara fol. 276).

Dr. Vella jinsisti li hu spjega r-riskji li kien hemm li jikkoncernaw il-procedura partikolari li kien ser juza bl-Excismer Laser, izda ma semmiex ir-riskju dwar retinal detachment billi dana m'huwiex marbut mal Excismer Laser.

Dan huwa kkonfermat ukoll mill-espert imqabbad mill-Qorti li qal li: The issue whether she was informed about all the possible complications of refractive laser surgery is not that relevant here, as the retinal detachment which she developed is not recognized as a complication of photorefractive keratectomy (PKR).

Hu spjega in kontroezami li: The complications which arose following the procedure adopted by Mr. I. Vella were not ones which the consultant would have considered as a risk of the operation. So he was not obliged to inform her. Retinal detachment is a possible complication of myopia but not of the treatment.

Dwar ir-riskji involuti fl-Excismer Laser u l-informazzjoni li tinghata, Dr. Janula qal hekk: There is always risk when you do surgeries, there is always possibility of complications. I can presume that if you go for surgery, it is routine, you always tell the patient there is always possibility of complications'.

Kin intqal fis-sentenza tal-Qorti tal-Appell **V. Sammut vs Dr. C. Fenech** (01/12/2006) li taghmel referenza ghal ktieb '**Law and Medical Ethics**' ta' Mason & Mc Call Smith (Butterworths, 3rd Edit), fejn jinghad, f'pagna 248, li biex jigi deciz x'ghandu jinghad lill-pazjent, it-test li soltu jigi segwit huwa dictum ta' Woodhouse J. fil-kawza **Smith v. Auckland Hospital Board**, deciza mill-Qorti tal-Appell ta' New Zealand fl-1965. It-test gie espress hekk:

'As it seems to me, the paramount consideration is the welfare of the patient and, given good faith on the part of the doctor, I think the exercise of his discretion in the area of advice must depend upon the patient's overall needs. To be taken into account should be the gravity of the condition to be treated, the importance of the benefits to be expected to flow from the treatment or procedure, the

need to encourage him to accept it, the relative significance of its inherent risks, the intellectual and emotional capacity of the patient to accept the information without such distortion as to prevent any rational decision at all, and the extent to which the patient may seem to have placed himself in his doctor's hands with the invitation that the latter accept on his behalf the responsibility for intricate or technical decisions' (ara ukoll f'dan is-sens **Zerafa vs Avramov et**, App. Civ. 30/5/2008).

Fil-ktieb ippubblikat fl-2002 mill-**Professor Maurice Cauchi** ('Bijoetika fl-Ewropa tal-lum') l-awtur jenfasizza fuq il-htiega ta' informazzjoni dwar l-ghan u n-natura tal-intervent, kif ukoll dwar il-konsegwenzi u r-riskju tieghu. Jghid li l-pazjent ghandu jkun informat bid-dettalji kollha mehtiega biex ikun jista' jiehu decizjoni. Ikompli jispjega, f'pagna III, li 'L-informazzjoni lill-pazjent ghandha tkun bizzzejjed biex ikun jista' jiehu decizjoni. Din ghandha tinkludi l-iskop, in-natura u l-konsegwenzi tal-intervent kif ukoll ir-riskji sewwa tal-intervent li jkun qed jigi propost, kif ukoll l-alternattivi li jistghu jezistu. U dan ghandu jinghata b'lingwagg li jiftiehem mill-pazjent.'

Il-Qorti hi propensa li taccetta l-verzjoni tal-konvenut meta xehed li hadd ma jiggarrantixxi success speċjalment fil-kirurgija ghax kollox ghandu side effects. Hi l-fehma tal-Qorti li l-attrici giet infurmata bir-riskji u kumplikazzjonijiet li jista' jkun hemm. Dr. Vella kien ilu jara lill-attrici mill-1993 u din bil-fiducja li irriponiet fil-konvenut tenut kont ta' din ir-relazzjoni professjonali pre-ezistenti bejniethom l-istess konvenut kien ser jaghmillha l-ahjar li jista' professjonalment biex itejjibilha l-kundizzjoni tal-vista taghha .

Il-Qorti tqis li ma nghatatx prova sodisfacenti tali mill-attrici li l-Qorti ghandha tkun konvinta moralment li l-konvenut naqas f'dan l-aspett.

## **Consent form**

L-attrici tilmenta ukoll illi qabel l-intervent ma nghatatx l-opportunita li tifli u tistudja l-consent form billi inghatatilha f'it hin biss qabel l-intervent u billi nurse li tatha l-consent form kienet amministratilha xi qtar f'ghajnejh u ma setax tara x'inhilha tiffirma.

Dr. Vella xehed li: 'These drops were only administered in her right eye. It is true that these drops can make the eye in question watery and can result in a stinging sensation, but these effects are short-lived and last only a few seconds'. Zied ighid li, 'Being short-sighted, Miss Ebejer could read the consent form without the use of her glasses. No medications that could have any effect on her consciousness were given to her prior to reading and signing the consent form' (ara fol. 309).

Hu minnu illi l-consent form inghatat lill-attrici minn nurse qabel l-intervent pero ma ngiebet ebda prova konvincenti mill-istess attrici li giet mgieghla tiffirma. Inltre ghalkemm l-attrici tallega li ma setghetx tara x'qed tiffirma ghax kellha l-qtar f'ghajnejha, dawn id-drops anestetici ma jipproducux dan l-effett u kieku dawn id-drops kienu jaffettwaw il-vista l-procedura kien ikollha tigi posposta.

Inltre l-Qorti taqbel ma dak li qal il-konvenut cioe l-qtar ma jaffettwawx il-kapacita mentali tal-pazjent, l-effett taghhom hu ta' f'it sekondi, u illi l-ghajn it-tajba ma giet effetwata bl-ebda mod. Inltre billi l-attrici tbatli minn short sightedness, il-fatt li nehhet in-nuccali ma impeditilhiex milli taqra l-consent form ghax bla nuccalli setghet taqra ahjar billi hi tbatli minn short sightedness.

Fl-ahharnett il-Qorti ma ssibx li gie ippruvat xi negligenza fl-operat tal-kirurgu u l-provi ma jwasslux lil Qorti tikkonkludi li l-attrici giet b'xi mod ingannata jew mgieghlha tiffirma ghal xi haga li ma kinitx taf biha qabel, jew li ma gharfitx l-import taghha qabel ma ffirmat tenut kont li r-riskji kienu gew spjegati lilha qabel, liema riskji pero' ma kinux jinkludu retinal detachment.

Ghalhekk anki dan l-ilment qed jigi michud.



## **Rabta bejn l-intervent u l-hsara sofferta**

L-attrici tissottometti li r-retinal detachment li kellha f'ghajnejha il-leminja grat minhabba l-intervent bil-laser li ghamlet ghand il-konvenut Dr. Vella. Hi l-kontenzjoni tal-attrici illi wara l-intervent hi giet aghar milli kienet u kien hemm deterjorament rapidu tal-vista ta' ghajnja l-leminja taghha u meta, wara l-intervent, irrikorriet ghand il-konvenut u nformatu dwar dan, huwa baqa' jinsisti li kollox kien sewwa u biz-zmien kienet ser tigi tajba. Ghalhekk tghid li, b'negligenza grossolana, l-konvenut halla z-zmien ighaddi, u sussegwentement, minhabba f'hekk, hi kellha tintbghat mill-awtoritajiet l-Ingilterra biex tigi rimmedjata l-hsara li kienet saritilha.

Il-konvenut Dr. Vella min-naha l-ohra jichad li hu agixxa b'negligenza grossolana. Isemmi li hu opera lill-attrici fil-17 ta' Lulju 1995 (ara fol. 125) u l-intervent kien sar b'success. Wara fis-7 ta' Settembru kienet cemplitlu l-attrici li riedet tarah urgentement billi qalitlu li l-vista taghha marret ghal aghar u meta ezaminha l-ghada t-8 ta' Settembru, li kienet festa pubblika u dahal apposta ghaliha l-klinika, sab li kienet zviluppat a right retinal detachment u rriferiha mal ewwel l-isptar San Luqa ghal-surgery. Kienet giet operata minn Mr. Thomas Fenech u wara baghtuha l-Ingilterra (ara fol. 131 sa 133).

Tajjed li f'dan l-istadju tigi spjegata l-kondizzjoni tal-attrici u dak li zviluppa wara l-intervent. Dan gie spjegat mill-espert mediku Dr. Jan Janula hekk:

Myopia - shortsightedness is the refractive error when the eye is too long or its dioptric system too strong. This causes the light rays not to be focused on the retina, but in front of it therefore the image on the retina is blurred. In addition to this, in higher myopia the vitreous body has a tendency to degenerate and to be replaced by fluid. The retina is thinner and very often peripheral degeneration is present. Person with myopia sees well for close distance but far distance is blurred. Myopia can be corrected by glasses with concave lenses, concave contact lenses or by reshaping the cornea by excimer laser to become more

concave. None of these options influences the degeneration of vitreous body or thins the retina.

Photorefractive keratectomy (PRK) is the technique, where by using specialized excimer laser, the surgeon reshapes the anterior part of cornea. In this way the refractive error is removed or reduced.

The technique involves the following: After application of anesthetic drops, the eyelid speculum is introduced in order to keep the eyelids open. The surgeon commences the procedure by removing the most superficial layer of the cornea - epithelium. Following this, the excimer laser is applied to remove part of anterior stroma of cornea and in this way, reshape the cornea. In patients with myopia the cornea becomes postoperatively more concave. Postoperatively antibiotics and corticosteroid ointment or drops is applied and the eye covered. It takes a few days for the superficial layer of the cornea - epithelium (which was removed at the beginning of the surgery) to regrow and cover the corneal surface. Until this happens, patients feel substantial discomfort.

The possible complications which might happen after PRK are the following:

Overcorrection - patient from myope becomes hypermetrope

Undercorrection- patient retains some of his original refractive error

Central islands - uneven surface of the cornea causing double or blurred vision

Decentered ablation - reshaping of the cornea is eccentric

Dry eye - need to use artificial tears

Corneal haze - causing misty vision - usually transient

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Complication of the postoperative steroids use: can cause glaucoma

Persistent corneal defects - epithelium does not heal properly

Corneal ulcer - infection of the cornea

Irregular astigmatism - irregular refractive error impossible to correct conventionally.

Wara li ghamel il-kostazzjonijiet u l-konsiderazzjonijiet tieghu l-espert nominat mill-Qorti, wasal ghall-konkluzzjoni li:

'Miss Carmen Ebejer lost the sight of her right eye as a result of severe retinal detachment with multiple tears complicated by proliferative vitreoretinopathy. According to my knowledge and my expert opinion her retinal detachment developed as a result of myopic changes of her retina and vitreous body and genetical predisposition. In agreement with the present scientific knowledge in Ophthalmology and according to my expert opinion the excimer laser treatment was not the cause for retinal detachment and its occurrence six weeks after refractive surgery was pure coincident'.

Il-konkluzzjoni li wasal ghalha l-espert tal-Qorti ghalhekk kienu tnejn u cioe' li (i) her retinal detachment developed as a result of myopic changes of her retina and vitreous body and genetical predisposition u (ii) the excimer laser treatment was not the cause for retinal detachment and its occurrence six weeks after refractive surgery was pure coincident.

Kif inhi l-gurisprudenza prevalenti l-opinjoni tal-espert tal-Qorti, speċjalment meta hi wahda teknika u speċjalizata ma tistax tigi skartata mill-Qorti jekk ma jkollhiex dubbju serji dwar ir-rizultanzi u r-raguni li jkunu waslu lill-espert ghal opinjoni esperta tieghu. Il-Qorti ma tistax tikkondividi s-sottomissjoni tal-attrici li beza' jesprimi opinjoni kontra Dr. Vella. Jigi notat li Dr. Azzopardi seta' jitlob nomina ta' periti addizzjonali jekk hu dehrlu li l-opinjoni tal-espert tal-

Qorti kienet timmerita revizjoni medika aktar approfondita, dettaljata jew studjata izda dan ma ghamlux kif jinghad fil-kawza **Giswarda Bugeja et vs Emanuele Muscat et**, App. Civ. 23/06/1967:

Il-kostatazzjoni dwar jekk l-opra gietx esegwita skond l-arti u s-sengha hi materja ta' indole teknika, u dment li l-konkluzzjonijiet ta' l-espert tekniku ma gewx gravament imqeghda fid-dubbju b'ragunijiet mhux rivi mill-konsiderazzjoni ta' l-aspett tekniku tal-materja that ezami l-Qorti jkollha taccetta dawn l-istess konkluzjonijiet. Dan aktar u aktar fejn l-attur nomine qua parti interessata ma pprevaliex ruhu mill-fokolta lilu moghtija mil-ligi b'talba ghan-nomina ta' periti addizzjonali.

Kif rajna l-attrici kienet pazjenta ta' Dr.Vella sa minn 1993 u meta hija kienet thajret biex taghmel dana t-trattament Dr. Vella kien ghamlilha l-ezami t'ghajnejha u sabha tajba (good candidate) biex taghmel l-intervent. Hu xehed li l-vizta taghha kienet dejjem stabbili u ghajnejha ma kinux morda.

Dwar l-intervent li ghamel Dr. Vella qal li: The excimer laser P.R.K. followed uneventfully and after the routine medications, she was discharged. The clinical findings (ara fol 309/310) show that the PRK was successful and that progress was being maintained.

Dwar l-akkuza mill-attrici li hu agixxa b'negligenza grossolana, l-konvenut wiegeb hekk: Plaintiff alleged that I delayed in referring her for the appropriate treatment. This is not true. In fact, Miss. Ebejer herself has stated that I had examined her the day after she informed me of her sudden visual deterioration, and that I referred her straightaway to St Luke's. At St.Luke's she was operated upon two days later. Her retinal detachment could not have been foreseen and when she first complained of sudden deterioration in her eyesight, I arranged to see her the following day even though it was a public holiday (ara fol. 311).

Dwar dak li qed issostni l-attrici li r-retinal detachment li kellha f'ghajnjha il-leminja grat minhabba l-intervent bil-

laser, il-konvenut ezebixxa l-annual ESCRS Symposium Document on Cataract, IOL and Refractive Surgery ppublikat fis-sena 2003 li sabet li 'there is no association between Excimer laser P.R.K, and the induction of retinal detachment' (ara fol. 311 u letteratura ezibita a fol. 426 et seq.).

Il-konvenut jikkwota ukoll lil Professor John Marshall, pijunier tal-excimer laser surgery mid- Department of Ophthalmology ta' St Thomas Hospital Londra, (ara fol. 312) li jsostni:

'There is no correlation between photo-refractive keratectomy and the incidence of retinal detachment. The association is a fortuitous one in that high myopes are prone to detachment and many high myopes come forward for P.R.K. There is no higher incidence of retinal detachment subsequent to P.R.K. than that which would occur in a high myope population as a result of the natural history of the disease.'

Il-konvenut jishaq li l-laser treatment ma jistax jikkawza retina detachment ghaliex l-intervent li huwa jaghmel kien fuq il- cornea u mhux fuq ir-retina li qeghdha fuq il- wara tal-ghajn. Dana gie kkonfermat minn Dr. Janula li xehed li 'retinal detachment is a possible complication of myopia but not of the treatment'.

Dwar id-dokument taht il-firma ta' Mr. Thomas Fenech a fol. 207 datat 10 ta' Ottubru 1995 il-konvenut ighid li l-attrici ma kellhiex -14 myopia izda -8 kif jirrizulta mid-dokument ezibit a fol. 120. Inoltre ma ngabitx prova li t-tliet kazijiet li semma Mr. Fenech fl-ittra tieghu kienu kollha ta' retinal detachment. Il-Qorti tirrileva f'dan ir-rigward illi kull kaz ghandu l-fattispecie tieghu u jrid jigi ezaminat separatament minn kull iehor. Dak li jirrizulta f'kaz mhux necessarjament jirrizulta f'kaz iehor u ma tistax tiggeneralizza. Inoltre ma jistax jinghad kif donnu allegat mill-attrici illi kien hemm koincidenza allarmanti ta' falliment mill-interventi ta' Dr. Vella. Tlett kazijiet minn xi elf ma turiex koincidenza ghalkemm ma jistax ma jinghadx li kull intervent li jfalli hu ta' dispjacir u ghandu jigi

investigat jekk mitlub biex tigi determinata bi prossimita l-kawza tal-falliment.

Mill-provi prodotti jirrizulta ukoll li fi Frar 1999, l-attrici kellha retina detachment f'ghajnejha ix-xellugija, fuq liema ghajn il-konvenut Dr. Vella ma kien ghamel ebda intervent. (ara fol. 134,135,155 u 208). Dwar dana kemm Dr. Vella kif ukoll l-espert tal-Qorti jaqblu li: The fact that Miss Ebejer sustained another detachment in her left eye confirms that her condition did not come as a result of the laser intervention (ara fol. 312) u ghalhekk 'The onset of the retinal detachment was clearly unrelated to the laser surgery'.

Dr. Janula mistoqsi dwar it-tears (ticrit) li gew notati wara li kien sar l-intervent minn Dr. Vella, risponda hekk:

Q. Asked if the tear (of the retina) could occur as a result of Excimer laser treatment long term?

A. No, it could have never occurred as a result of Excimer laser treatment.

Q. Not even if the laser is applied for a fraction of a second more that it should have?

A, The answer is no because if it is applied for longer than it should be applied, it will only effect the refraction (ara fol. 327/8).

Dr. Janula spjega li: 'The laser corrects what the refraction is. It does not have anything to do with the length of time or anything (ara fol. 328).

Dwar it-tears Dr. Janula kompla xehed li: If there were tears these would have to be treated with a different type of laser. In Mr. Vella's report there was that he checked and did not find tears. If she had retinal tears she would have symptoms and would be aware of the symptoms.

Jigi notat ukoll illi kif korrettement irrimarka Dr. Vella mid-dokumenti ezibiti dwar il-file tal-attrici fl-Inghilterra imkien f'dawn id-dokumenti ma jinghad jew b'xi mod jigi attribwit li r-retinal detachment li kellha f'ghajnejha l-leminja kienet kagun tal-lazer treatment.

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Lanqas l-ispeċjalisti Maltin u barranin ma ighidu jew jattribwixxi li dak li ghalha l-attrici kien rizultat tal-intervent bil-lazer. Suspetti biss mhumiex prova.

Mir-rapport tal-espert u mix-xiehda li nghatat, jirrizulta lill-Qorti li l-intervent kien success, pero in segwitu kien hemm a retinal detachment liema detachment ma kienx u ma giex ppruvat li kien rizultat tal-intervent bil-lazer.

Il-Qorti ghalhekk ma tistax taghmel ness ta' kawzalita bejn id-dannu, jekk jista' jissejjah hekk, u l-operat tal-konvenut

Ghalhekk dan l-ilment qed jigi respint.

### **Decide**

Ghalhekk il-Qorti taqta' u tiddeciedi billi tichad l-eccezzjoni tal-preskrizzjoni mqajma mill-konvenuti kollha, tilqa' l-eccezzjoni ta' Dr. Josie Muscat li mhux legittimu kontradditur meta mharrek in rappresentanza ta' Summit Eye Laser Clinic u St. James Health Care u ghalhekk tilliberah mill-osservanza tal-gudizzju u finalment tilqa' l-eccezzjoni fil-mertu ta' Dr. Ivan Vella illi bl-ebda mod ma kien negligenti jew naqas fil-konfront tal-attrici fl-intervent u kura li ppresta lill-attrici u kwindi tichad it-talbiet attrici.

Bl-ispejjez kontra taghha.

**< Sentenza Finali >**

-----TMIEM-----